

In re) Fair Hearing No. 15,480
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Appeal of)

The petitioner appeals a decision of the Department of Social Welfare terminating her ANFC benefits because she is not an "eligible parent" within the meaning of the pertinent regulations.

1. The petitioner was granted ANFC in May of 1997, for herself and her five-year-old son who lived with her. During the summer of 1997, the petitioner had increasing problems with drug addiction and was in treatment for it. In July of 1997, she relapsed and SRS became involved after she left her son for a time without adult supervision. A CHINS petition was filed and SRS obtained temporary custody of the boy. Physical custody was then placed with his father.

2. During the following months, the boy lived with both his father and increasingly with his mother as she recovered. In March of 1998, SRS was removed as the legal custodian and both the petitioner and the boy's father were made joint legal custodians but physical custody remained with the father. The petitioner was given liberal visitation rights which were specifically spelled out in the

order. Throughout this period, the petitioner continued to receive ANFC payments.

3. In April of 1998, an Office of Child Support worker in the process of trying to obtain reimbursement for the petitioner's ANFC support discovered that the father, and not the petitioner, was the physical custodian of the boy.

4. Pursuant to this information, the Department notified the petitioner that her benefits would close effective May 19, 1998, because there was no eligible child in her home.

5. The petitioner appealed that decision because by that time she was caring for her son at least half of the time. He was and continues to be with her from Tuesday at 8:30 a.m. until Friday at noon and on three consecutive Saturdays every month from 8 a.m. until 6:30 p.m. while his father works. (He works on a night shift for four hours every week.)¹ The boy's father cares for him on Fridays, Sundays, Mondays, and alternating Saturday nights. He does not disagree that the petitioner cares for the boy during the hours set forth in the decree and perhaps others as well. He has offered to pay her \$75.00 per week if she loses her ANFC benefits to cover her expenses of caring for

¹ The Court decree actually gives the petitioner visitation rights from Tuesdays at 2:00 p.m. through Fridays at 9:00 a.m. and three consecutive Saturdays per month from 9:00 a.m. until 6:30 p.m.

the boy.

6. After she was advised of her ineligibility, the petitioner, with the assistance of community advocates, immediately filed for a change of physical custody with the family court. Although she was allowed several continuances of this hearing to allow a court to resolve this matter, several delays have been interposed and there has still been no decision on the modification request. The delays have not been the result of any actions taken by the petitioner.

ORDER

The decision of the Department is affirmed.

REASONS

W.A.M. § 2242.2 defines an "eligible parent" for ANFC as "an individual who . . . lives in the same household with one or more eligible . . . children."² The regulations also require that "to be eligible for public assistance (ANFC), a dependent child shall be living with a relative in a residence maintained as a home by such relative. . . ." W.A.M. 2302.1.³ When parents who are both ANFC recipients

² This regulation is derived from the state statute governing "Aid and Services to Needy Families" which provides that "[a]id shall be given for the benefit of a dependent child to the relative with whom the child is living unless otherwise provided." 33 V.S.A. § 1103(a).

³ The statute also follows for payments for "qualified caretakers" with whom a child might live. See W.A.M. 2302.1

separate, the "payment of assistance shall continue to the parent who retains continuing care and supervision of the eligible child(ren). . . ." W.A.M. 2224.

The Department has not adopted a specific rule about the ANFC eligibility of parents whose children appear to "live with" both parents.⁴ The Department has taken the position, following the federal regulation at 45 C.F.R. § 233.90(c)(2), that only one household in which the child is living can be potentially eligible at any one time for monthly ANFC benefits. This view was adopted by the Board and it was decided in a case in which neither parent had formal legal custody that it is the parent who provides the primary "home" for the children who is eligible for ANFC. Fair Hearing No. 5553; Aff'd. Monro-Dorsey v. D.S.W., 144 VT. 614 (1984). The primary home rule was also adopted in Fair Hearings 9,521 and 11,182 in which the parents had court-ordered joint physical custody of the child. The primary home status was determined through an analysis of such factors as amount of time with each parent and place where the child attends school.

In this case, the child appears to spend about an equal amount of time with each parent, perhaps even a little more with the mother. However, unlike the above cases, there is

⁴ The Board urged the Department to adopt such a rule in a footnote in Fair Hearing No. 11,182 decided in 1992, and suggested that proration of ANFC amounts for part-time parents may not be prohibited by federal regulations.

a specific court order which has awarded physical custody of her child to the other parent. While the petitioner continues to have joint legal custody of the child, the court has clearly given the physical custodianship of the child to the father and has labeled the mother's time with the child as "visitation." By giving the father physical custody of his son, the Court has already chosen the child's "primary" home and has appointed the father the parent who has the responsibility for the continuing care and supervision of the child. That court decision cannot be reviewed and overturned by the Board.

The result for the petitioner (and her child) is an unfortunate one. Although she appears to be providing care for this young child for a substantial amount of time each month, she cannot make a legal claim for financial help with his support from the Department or from the boy's father, who as the custodian is not obligated to pay child support.⁵

Absent any regulation in the Department's rules which would allow a proration of benefits, this matter can only be addressed through appeal to the family court (which the petitioner is pursuing) or by reliance on the voluntary generosity of the boy's father. As the Department's decision that she is ineligible for ANFC benefits is

⁵ The Department's inability to legally pursue the father for support was another reason offered by the Department as to why the petitioner could not be paid benefits.

supported by law and regulation, the Board is bound to affirm its decision. 3 V.S.A. § 3091(d), Fair Hearing Rule 17.

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